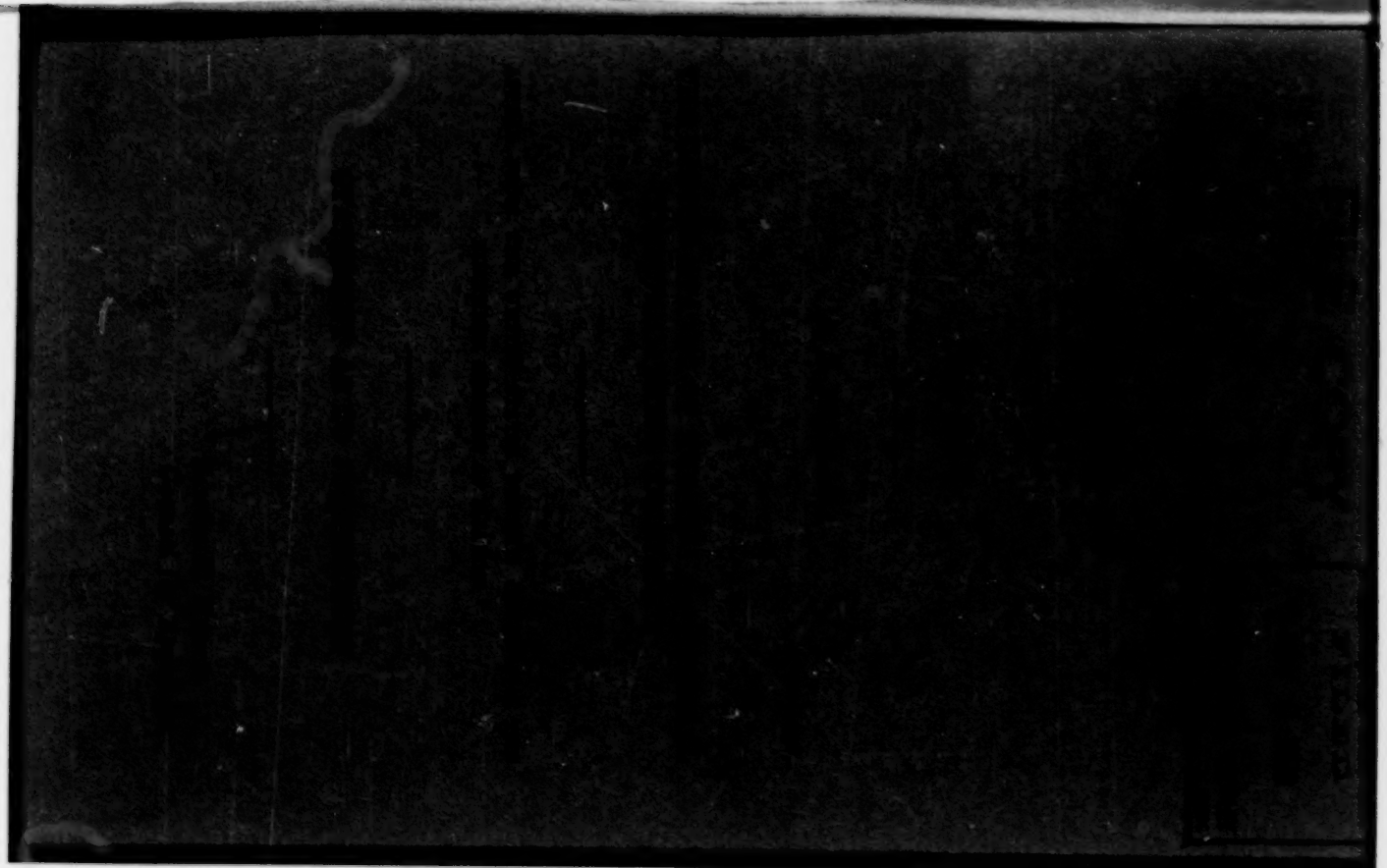

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IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

Civil Action No. 49 C 227

A. J. FELMAN,
Plaintiff,

vs.

UNITED STATES OF AMERICA,
Defendant,

FEDERAL COMMUNICATIONS COMMISSION,
Intervenor

JURISDICTIONAL STATEMENT

In compliance with Rule 12 of the Revised Rules of the Supreme Court of the United States, adopted February 13, 1939, as amended March 25, 1940, October 21, 1940, May 26, 1941, and April 6, 1942, the plaintiff-appellant submits herewith his statement showing the basis of the jurisdiction of the Supreme Court of the United States to entertain the appeal in this cause.

(a) The statutory jurisdiction of the Supreme Court to review by direct appeal the final judgment and decree here complained of is conferred by Section 1253 of Title 28, United States Code.

(b) Under the statute of the United States (Section 303(f), (j) and (r) of the Communications Act of 1934, 48 Stat. 1082, as amended by 52 Stat. 190, 191), granting authority to the Federal Communications Commission to "make such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this chapter", Rule 3.109 was promulgated. Plaintiff-appellant complains of said rule in its application as to him, as being unreasonable, arbitrary and not contemplated or authorized by the statute; and contends that, if contemplated by the statute, then the statute, in its application to plaintiff-appellant, is unconstitutional and void.

This suit was brought under Section 402(a) of the Communications Act of 1934, 48 Stat. 1093, as amended by 50 Stat. 197 and 63 Stat. 108, the procedure being governed by Title 28, United States Code, Section 1336. Inasmuch as the complaint prayed an injunction restraining the enforcement, operation or order of the Federal Communications Commission, the case was required to be tried by a three-judge court pursuant to Title 28, United States Code, Section 2325.

The complaint was against the United States of America as defendant. The Federal Communications Commission intervened. The defendant and the intervenor joined in a motion to dismiss or, in the alternative, for summary judgment. The case was heard by the three-judge court upon the complaint and such motion, and upon briefs and oral arguments. The Court denied the motion to dismiss but granted the motion for summary judgment. The Court made Findings of Fact and Conclusions of Law, but delivered no opinion.

The following decisions are believed to sustain the jurisdiction both of the Supreme Court and of the District Court: *Columbia Broadcasting System, Inc.* v. *United States,* 316

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U. S. 407 (1941); *National Broadcasting Co.* v. *United States*, 316 U. S. 447 (1941).

The complaint (which upon motion to dismiss or for summary judgment must be taken as true) alleged in substance as follows:

Plaintiff alleged that in 1932 he sold all of the capital stock of a corporation owning and operating Radio Station WCLS in Joliet, Illinois, to one Hoffman. On August 9, 1937, a new contract was substituted for the 1932 contract, and provided for a small amount of cash and a reservation of ¾ of an hour a day as long as the station broadcasts, free of charge, for the advertising of plaintiff's products, the products of the Boston Store (a department store plaintiff operates), and for any of the products for sale in the Boston Store. No interest in the property of the station, in the license, no control of the management, no reverter and no right to insist upon the use of programs or interference with the right of censorship in the station, was provided or ever asserted or claimed.

Section 151, Sub-section (i) of Section 154, and Subsection (r) of Section 303, of the Communications Act of 1934 (June 19, 1934, Chapter 652, Sections 1, 4 and 303, 48 Stat. 1034, 1066, 1082 as amended May 20, 1937, Chapter 229, Sections 1, 3, 4, 5, 6a, 6b, 50 Stat. 189, 190, 191) provide in part as follows:

> 151: "For the purpose of regulating interstate and foreign commerce in communication by wire and radio, so as to make available * * * a *rapid, efficient* * * * wire and radio communication *service with adequate facilities* * * * there is hereby created * * * the Federal Communications Commission * * *."
>
> 154(i): "The Commission may perform any and all acts, make such rules and regulations, and issue such orders, *not inconsistent with this chapter, as may be necessary* in the execution of its function."

303(r): "Make such rules and regulations and prescribe such restrictions and conditions, *not inconsistent with law, as may be necessary* to carry out the provisions of this chapter. (Emphasis supplied.)

Prior to the promulgation of Rule 3.109 by the Federal Communications Commission, the owner of the Station WJOL (formerly WCLS) made application for renewal of its license. Temporary extensions have been granted, pending compliance, by such owner and plaintiff, with said rule. In that connection the Commission demands that the contract of August 9, 1937, be amended so that it will not run beyond February 16, 1964, and so that it will be terminable at the option of the licensee, at an agreed figure not to be so unduly large as to prevent the exercise of the option in practice, and to be approved by the Commission. Plaintiff contends that the promulgation of the rule to apply in any and all cases, *and particularly under the facts of plaintiff's situation,* is not authorized by the statute and does not follow the decision of the Circuit Court of Appeals for the District of Columbia in *Churchill Tabernacle* v. *Federal Communications Commission,* 160 F. 2d 244, where the Court distinctly announced that no existing contracts should be unreasonably disturbed unless the public interest demands it.

Plaintiff alleges that the application of the rule as to his situation does not in any manner promote the public interest, which plaintiff claims is not involved, and that the Commission had no power to make a rule applicable to any and all cases and which did not follow the rule announced by the Court of Appeals.

Plaintiff therefore states that the action of the Commission in attempting to apply the rule to plaintiff is unreasonable, arbitrary and will deprive plaintiff of his property in violation of the Fifth Amendment to the United States Constitution, and plaintiff in his complaint sought an injunction against the enforcement of the rule.

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Appellant is informed that there are a considerable number of reserved time cases to which Rule 3.109 will apply, if held valid as a rule of general application.

The important question involved in this case is whether the Commission, under the statute above quoted, may promulgate a rule (3.109) *to apply to any and all cases* when under the admitted facts of the plaintiff's case the contract and operation of the contract does in no way affect the public interest.

As stated above, the contract did not involve the reservation of any interest in the license or in the station's property, did not vest any control in the plaintiff and the operation of the station, or management thereof. The station had full right to reject any and all programs offered by the plaintiff and the contract gave the station full and complete right to substitute other programs in the public interest. The contract merely gave the plaintiff the right, free of charge, to broadcast for ¾ of an hour a day programs advertising plaintiff's Boston Store and all products offered for sale therein. Plaintiff charged parties whose merchandise was advertised and sold in the Boston Store an amount less than the station's rate.

The Court of Appeals in *Churchill Tabernacle* v. *Federal Communications Commission*, 160 F. 2d, 244 (where there was an express reservation of interest in the property and in the license, and where the number of hours a day of reserved time for the Tabernacle was unreasonably long) held that the public interest was not served by such a contract but that the station and the owner of the contract should be given every reasonable opportunity to amend the contract so that it would not affect the public interest, *and that the owner of the reserved time be not unreasonably deprived of his property under the contract.*

Instead of following the rule announced by the Court of Appeals, the Commission adopted a general rule setting forth conditions *that must be met in all cases of reserved time contracts* instead of ruling on each contract by itself, and independent of whether in the particular case the execution of the contract affected the public interest. Plaintiff contends that the language, construction, and operation of its contract in no way affects public interest; that the only difference between it and any other renter of time is that instead of paying the station for the time rented and the station applying the payment on the purchase price, the time is free; that under such conditions the application of the rule to plaintiff deprives plaintiff of his purchase price for the station arbitrarily, unreasonably and without any requirement of the public interest; and that such action is not authorized by the statute or contemplated by it; and that if contemplated by the statute, is arbitrary and unreasonable and in violation of the Fifth Amendment to the Constitution. As above stated, appellant is informed that a considerable number of reserved time cases will be affected if Rule 3.109 is held to be valid as a rule of general application. It is important for the plaintiff and all others similarly situated to know whether the Commission can by general rule, and not by the merits of each case, invade the property rights of plaintiff and similarly situated persons, where the public good in no way demands it or is affected by it.

We believe, also that this issue has not been decided by the Supreme Court and should be passed upon in the interest of the plaintiff and of all others similarly situated and in the interest of the Commission itself.

Respectfully submitted,

SAMUEL E. HIRSCH,
Counsel for Appellant.

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CHARLES ELMORE CROPLEY
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1949.

No. 814

A. J. FELMAN,

Appellant,

vs.

UNITED STATES OF AMERICA AND FEDERAL COMMUNICATIONS COMMISSION,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS.

BRIEF OF A. J. FELMAN, APPELLANT, IN OPPOSITION TO MOTION TO AFFIRM FILED BY APPELLEES.

SAMUEL E. HIRSCH,
Attorney for Appellant.

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A. J. FELMAN,

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UNITED STATES OF AMERICA AND FEDERAL COMMUNICATIONS COMMISSION,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS.

BRIEF OF A. J. FELMAN, APPELLANT, IN OPPOSITION TO MOTION TO AFFIRM FILED BY APPELLEES.

QUESTIONS PRESENTED.

This appeal presents the substantial and important question as to whether the Federal Communications Commission, under the applicable statute and the Fifth Amendment to the United States Constitution, may promulgate a general rule (3.109) *to apply to any and all cases when, under the admitted facts of appellant's case, the reserved time contract involved, and the operation thereof, has not*

affected and cannot affect the public interest, convenience or necessity;

Whether a contract entered into eleven and one-half years prior to the promulgation of the rule reserving a purchase price can arbitrarily be destroyed when the public interest is not involved?

Whether the purchase price under such a contract can unreasonably and arbitrarily be diminished and invaded under the Fifth Amendment to the Constitution of the United States if the public interest does not demand it?

Whether private property can be taken without compensation under the Fifth Amendment unless the public interest so demands?

The issue is not whether the Commission has a general power to make rules in proper cases. The general power to make rules is not challenged, and never has been challenged, by appellant. Appellant only challenges the right of the Commission to apply Rule 3.109 to him and his particular reserved time contract under the admitted facts of the case.

The text of Rule 3.109 of the Federal Communications Commission is shown in the appendix to appellees' motion to affirm, and in the appendix to this brief.

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PRELIMINARY STATEMENT.

The question at issue upon appellees' motion to affirm, is whether appellees' motion to affirm makes it manifest to the Court that the question on which the decision of this cause depends is so unsubstantial as not to need further argument. This question is discussed under Point III of this brief.

The facts upon which the merits of this case must be decided are set forth in Point I of this brief.

ARGUMENT.

I.

The Federal Communications Commission is Not Authorized, Under the Applicable Statute and the Fifth Amendment to the United States Constitution, to Promulgate a General Rule, Such as Rule 3.109, to Apply to Any and All Cases of Reserved Time Contracts When, Under the Admitted Facts of a Particular case, Neither Such Contract Nor the Operation of the Station Involved, Has Affected, and Cannot Affect, the Public Interest, Convenience or Necessity.

The issue is not whether the Commission has a general power, in proper cases, to make rules. Such general power is not challenged, and never has been challenged, by appellant, but appellant does challenge the right of the Commission to make Rule 3.109 apply to him and his particular reserved time contract in view of the admitted facts of this case as alleged in the complaint.

For the convenience of the Court, a copy of the Complaint in this cause is attached to this brief as an appendix. The allegations contained in said complaint are not denied by the appellees and must be taken as true for the purposes of this appeal.

The complaint contains the following allegations and the references in parentheses are to the several paragraphs in the complaint.

A. J. Felman, appellant, is a resident of Joliet, Illinois, and is president of the M. A. Felman Company, a corporation, which operates a department store in Joliet under the trade name of The Boston Store. All the capital stock of M. A. Felman Company is owned by appellant and his immediate family. (Paragraph 1.)

On and prior to June 21, 1932, appellant owned all the capital stock of WCLS, Inc., which owned and operated radio station WCLS in Joliet. (Paragraph 3.) (The call letters of this station have been changed to WJOL and the corporate name of the licensee has been changed to Joliet Broadcast Co.)

On June 21, 1932, appellant sold his capital stock to one W. R. Hoffman, and, in partial consideration for the sale, certain broadcast time was reserved to appellant. (Paragraph 4.)

This contract continued in effect until August 9, 1937, when it was canceled by mutual agreement and a new agreement entered into in which the station made available to appellant, without charge, three-quarters of an hour per day, divided into two periods, for broadcasting purposes. This reserved time was to be used solely to advertise the business of the appellant, The Boston Store, M. A. Felman Company, and any other firm from which The Boston Store had purchased goods. (Paragraph 5.)

All programs broadcast during the reserved time were,

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and are, in fact, subject to the rules and regulations of radio station WCLS (now WJOL) and of the Federal Communications Commission. (Paragraph 5.)

This reserved time was partly in consideration for the transfer by appellant to R. W. Hoffman of the capital stock of WCLS, Inc. (Paragraph 6.)

In conformance with the provisions of said agreement and said rules, all programs, including advertising matter, broadcast during the reserved time were submitted to the station management for prior approval at least twenty-four hours, and generally a week in advance. Each script must be and is approved by the station's program director, who may edit and revise the material submitted. In all respects the material submitted by appellant is accorded the same treatment as that submitted by all other advertisers. The management reserved the right at all times to pass upon the propriety of such programs and advertising matter, and to substitute other programs during the reserved periods when, in the opinion of the station management, the substitution of programs was deemed to be in the public interest. (Paragraph 7.)

At no time since June 21, 1932, has the station ever had occasion to change, modify or reject any material submitted by the appellant for broadcasting purposes. (Paragraph 8.)

All sponsors using appellant's reserved time do business with The Boston Store and are personally known to the management of the station, which knows the main place of business, the reputation of the products sold and the reputation of each said sponsors. (Paragraph 10.)

The type of programs broadcast by these sponsors are the same as those broadcast by regular renters of broadcast time, and consist of transcriptions used by from one to two hundred radio stations, transcribed light concert music taken from the station's library, and spot announce-

ments advertising merchandise on sale at The Boston Store. (Paragraph 11.)

Rule 3.109, as applied to appellant and his reserved time contract, deprives appellant of his property without due process of law, contrary to the Fifth Amendment. (Paragraph 14.)

Rule 3.109 does not in any way promote or tend to promote the public interest or welfare. Prior rules and regulations pertaining to retention by licensee of control over programs, and providing for substitution of other programs, provide adequate protection of such public interest. (Paragraph 15.)

Appellant's reserved time contract does not impair the financial condition of this station, and does not deprive the management of any of its duties or responsibilities, and does not infringe upon the station's power to broadcast programs designed to promote the public interest and welfare, and does not delegate to appellant any part of the licensee's rights, duties, responsibilities, or control. (Paragraph 16.)

The above allegations of the complaint constitute the admitted facts which make it impossible for the Commission, to promulgate any general rule, which will not be arbitrary, unreasonable and unnecessary, and which will serve the only legal purpose, that of protecting the public interest, convenience and necessity.

Turning now to appellees' motion to affirm, it is to be noted that all their statements are generalizations not applicable to the facts of this case.

Appellees, on page 4 of their motion, say that the statute authorizes the Commission to make rules directed against restraints imposed by third persons upon a licensee's operation of a station, *when such restraints may interfere with the licensee's ability to render the best practicable service to his listening public.*

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Granted, but the admitted facts show conclusively that appellant's reserved time contract cannot possibly interfere with the licensee's ability to render such service.

Again, on page 4, appellees quote Section 4(i) of the Communications Act granting the Commission authority to make such rules and regulations, not inconsistent with the Act, "as may be necessary in the execution of its functions" and "as may be necessary to carry out the provisions of this Act." Appellant contends that, as applied to him and his reserved time contract, Rule 3.109 was neither necessary for the execution by the Commission of its functions nor to enable the Commission to carry out the provisions of the Act. As a matter of fact, the rule bears no relation to the public interest.

Appellees, on page 4, further state that the import of the Act is that a licensee shall be amenable to regulation for the purpose of insuring operation of his station in the public interest, and that, therefore, the Commission may adopt regulations against grant or renewal of a license if the licensee has assumed an obligation to a third person encroaching upon his ability the best to serve those whom his broadcasts reach.

Whether or not the licensee has assumed an obligation to a third party so encroaching upon his ability to serve those whom his broadcasts reach, is a question of fact. It is an admitted fact in this case that the licensee has not assumed any obligation to a third person encroaching upon licensee's ability to serve those whom his broadcasts reach, but, to the contrary, that the obligation assumed by the licensee, namely, as purchase price for his purchase of the station, to give a small amount of free time each week, is in all other respects similar to the arrangement made to a renter of time. The type of program, and time of broadcast, are subject to full control of the licensee, and the only difference is that, instead of the appellant's sending licensee

a check for the time rented and the licensee's remitting the amount of such check as a payment upon the purchase price, the mechanical labor is short circuited. Were the mechanical labor not short-circuited, the issue could not arise. The situation has existed for over twelve and one-half years, with the knowledge and approval of the Commission, and no claim of encroachment has or can be made.

Appellees jutisfy the promulgation of the rule by stating that it represents the Commission's consideration of how best to "accommodate the public interest standard." Whether the method selected was thoroughly considered by the Commission is not at issue. No doubt it was. Nevertheless, the making of a rule to apply *ex post facto* to any and all cases, in an attempt to reconcile cases where the facts vary, inevitably results in injustice where applied retroactively. What may be reasonable in one case becomes totally unreasonable in another. This has often been recognized in connection with the question of constitutionality of zoning ordinances and rules which, in general, have been held to be valid, but in their application to any particular case have been held to be unreasonable and to invade private property rights, and the ordinance or rule as applied to a particular case is held to be void.[1] So here, the general rule-making power in the general public interest may be all right where under the facts those rules are reasonable to apply. Where in a particular case and where the application of the rule does the public no good, but does irreparable harm to the private party, the rule must yield to the rights of the private party. This is especially true when the rule is applied to a contract made

1. Note: The latest case on this point decided by the Supreme Court of Illinois is *Galt* v. *County of Cook*, 405 Ill. 396, which followed many previous decisions. At page 403, the Court said: "A zoning ordinance may be valid in its general aspects, yet invalid as applied to a particular piece of property and a particular set of facts."

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over twelve and one-half years prior thereto and which has operated satisfactorily to the station and the Commission ever since.

Appellees, on page 5, state that the prohibition of the resale of reserved time insures that a licensee will continue to perform the elementary function of making its initial determination as to who shall broadcast. The station did make that determination when it entered into the reserved time contract. It expressly provided that the reserved time be used "for the purpose of advertising the business of yourself (appellant), The Boston Store, the M. A. Felman Company or any other firm with which you do any business." (Paragraph 5.) Appellant does not claim any unrestricted right to sell reserved time, and it certainly can make no difference to the public interest which of the following spot announcements were made:

> "This program comes to you by the courtesy of The Boston Store which is conducting a sale of such and such merchandise manufactured by the John Smith Company"
>
> or
>
> "This program comes to you by the courtesy of the John Smith Company whose such and such merchandise is on sale at The Boston Store."

Again, on page 6, Appellees discuss the attempt of the Commission to limit the term of a reserved time contract to fifteen years. If, in fact, a reserved time contract has been in effect for twelve and one-half years, with no unfavorable results to the public interest or to the carrying out by the station of its duties, no limitation is justifiable where it would deprive the owner of reserved time of his consideration for sale of the station.

If the reserved time was five minutes per day no one would claim it should be limited to fifteen years or any other period. Neither can a reservation of five and one-

quarter hours per week justify any such limitation, especially as the Commission itself recognizes that twelve hours per week is reasonable.

Appellees, on pages 6 and 7, next discuss the recapture provision of Rule 3.109. This provision is the most arbitrary and unreasonable provision of the rule. It amounts to duress as to both the licensee and the owner of reserved time. If they cannot agree as to the recapture price, the Commission will not renew the license and the station will lose its license and appellant will lose the consideration the station agreed over twelve and one-half years ago to pay him for the station. This retroactive provision is contrary to the Fifth Amendment because not necessary to protect the public interest, convenience or necessity. And, in this connection, appellees do not attempt to justify the provision of the rule giving to the Commission the right to pass upon the propriety of any price agreement the parties might be able to reach.

Appellees cite *National Broadcasting Company* v. *United States*, 319 U. S. 190, and *Churchill Tabernacle* v. *Federal Communications Commission*, 160 F. (2d) 244, in support of the validity of Rule 3.109 as applied to any and all cases of reserved time contracts. Neither case so holds.

In the *National Broadcasting Co.* case, the rules in question applied to radio stations engaged in chain broadcasting. The Commission undertook a comprehensive investigation to determine whether special regulations were required in the public interest, convenience or necessity. Extended hearings were had, of which notice was given to all stations. Ninety-six witnesses were heard and over eight thousand pages of testimony and more than seven hundred exhibits were received. It appeared that all of the large networks used a standard form of contract which all affiliates were required to sign. There was no distinc-

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tion among the several stations, but all were subject to the same conditions. These conditions were arbitrary, oppressive and, to a large extent, contrary to the anti-trust laws. Each affiliate was required to accept and broadcast programs furnished by the network and at the hours required by the network. No affiliate could become an affiliate of any other network. The station's rates were under the control of the network. In fact, no other way of dealing with the subject was possible except through general rules. The Commission found that eight network abuses were amenable to correction within the powers granted by Congress.

Mr. Justice Frankfurter, in affirming the decision of the Commission, at page 216 said:

> "The Commission was, however, not left at large in performing this duty. The touchstone provided by Congress was the 'public interest, convenience, or necessity,' * * *. 'This criterion is not to be interpreted as setting up a standard so indefinite as to confer an unlimited power. * * *'"

Again, at page 219, Mr. Justice Frankfurter said:

> "Generalities unrelated to the living problems of radio communication of course cannot justify exercises of power by the Commission."

The *National Broadcasting Co.* case rightly decided that the Commission had power to make the general rule as applied to the particular subject of chain broadcasting. It did not decide and it did not intend to decide that the Commission had power to promulgate a general rule which could not reasonably be applied to particular cases.

In *Churchill Tabernacle* v. *Federal Communications Commission*, 160 F. (2nd) 244, it appeared that the Commission had before it a particular reserved time contract which it had previously approved. This contract reserved the sole

and absolute use of broadcast periods on Sunday from 6 a. m. to 1:30 p. m., from 7 p. m. to 10 p. m., and again from 11 p. m. on Sunday to 6 a. m. on Monday. The contract also provided that the licensee would pay the Tabernacle $300 per week until September, 1936, and thereafter $150 per week, and would not dispose of its operating license without the consent of the Tabernacle. The contract also provided for a reverter to the Tabernacle upon breach of the contract by the station. Later supplemental contracts extended the reserved broadcast periods.

The Commission denied the application for renewal of the license, without prejudice to the licensee filing a new application when it should be able to show that it would thereafter have the exclusive use and control of the station, and that no further effect would be given to the reserved time agreement.

The Court found that the provisions as to reservation of time and reverter were contrary to the public interest.

The Court, at page 247, said:

> "The Commission has failed to make any findings that the provisions of the contract, as to the reverter of physical property or the payment of the weekly sums stipulated in the contract, or that a contract for a lesser period of time, are contrary to the public interest. Yet its blanket order requires the licensee to abrogate completely these provisions as well as several others to which the Commission objects. As a practical result, the Church is left with what the Commission calls a right of action 'in another tribunal' to secure indemnity for its loss, but this overlooks the very heart of the contract, for it is not money indemnity which the Church is seeking, and it is not money indemnity which will place it in *statu quo*. Its objective was and is the reasonable use of the facilities of its formerly owned radio station in the propagation of its religious doctrines. To deprive it of this is to destroy the bone and marrow of its being.

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Until now that right, confirmed by the Commission's approval, was secured by its contract. Now, it is lost in its entirety. That there may be features of the contract not sustainable under the new outlook of the Commission it does not deny. The Church has not at any time urged, nor does it now urge, that the provision for the reverter of the license can be enforced. It concedes it had no private property in such license. But this does not also concede that its other reserved rights may be destroyed without a finding that they violate the Act. On the contrary, it would seem to us that the facts we have mentioned would justify—if not require—the Commission, in recognition of those rights, to offer the applicant and the Church the opportunity to substitute for the objectionable provisions modifications that would not be contrary to the public interest, and that would save to the Church privileges necessary to its proper functioning. This would merely recognize the rule of fairness, which the Supreme Court has recognized again and again, that only those provisions that are inherently objectionable should be condemned. * * *

"Viewed in this light, we think the Commission's order went too far. There is no novelty in the suggestion that an agreement for broadcast time within the granted license period is not violative of the public interest, for the Commission at this very time, under circumstances like those we have here, has approved a modified form of contract binding within the present life of the broadcast license. In our view, similar action might very well be taken here. For in ordinary fairness, the Federal Communications Commission * * * owes the duty to exhaust all possible avenues of compliance with the Congressional purpose before requiring complete destruction of the private interest. In the recent case of *Jacob Siegel Co.* v. *Federal Trade Commission* (327 U. S. 608), the Supreme Court found that the Trade Commission had failed to consider whether the ends of the Act might not be fulfilled and at the same time valuable rights of the applicant saved, and remanded the case to the

> Commission for determination on that point. And before that, in *Federal Trade Commission* v. *Royal Milling Co.* (288 U. S. 212), the Court said that the order of the Commission should go no further than is reasonably necessary to correct the evil, while at the same time preserving the rights of competitors and of the public. Though the language of the statutes is not identical, we can think of no good reason why the same just rule is not equally applicable here."

The Court did not send the *Tabernacle* case back to the Commission for the Commission to make a general rule on the subject. It remanded the case so that the Commission could deal with the particular facts of the case in a proper manner.

It is true that the decision in the *Tabernacle* case was the compelling reason for the attempt by the Commission to regulate reserved time contracts by a general rule, but the implication of the *Tabernacle* case is to the contrary, and appellant submits that neither the *National Broadcasting Co.* case nor the *Tabernacle* case supports the claim of appellees that the Commission has the power to make a general rule applicable to any and all cases of reserved time contracts.

II.

The Three-Judge Trial Court Neither Followed the Decision in Churchill Tabernacle v. Federal Communications Commission Nor Gave Any Effect to the Admitted Facts Alleged in the Complaint.

As already shown, the plain import of the *Churchill Tabernacle* case was that the Commission should not disturb an existing reserved time contract unless required by public interest.

The trial court adopted without change the finding of

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fact and conclusions of law proposed by appellees. These findings ignored the various allegations of the complaint hereinbefore referred to which conclusively showed (a), that Rule 3.109 was not necessary and bore no relation to the public interest, convenience or necessity, and (b), that the application of the rule to appellant and his reserved time contract would be arbitrary, unreasonable and unnecessarily harsh.

It is evident that the trial court's mental operation was:

a. Does the Communications Act give the Commission power to promulgate rules? and
b. If so, such rules, of course, apply to appellant whether necessary or reasonable.

It is probable that if the trial court had understood and applied the principle of the *Churchill Tabernacle* case and had given attention to the particular facts shown by the complaint to exist, the trial court would not have entered a summary judgment in favor of appellees.

III.

The Question Upon Which the Decision of This Cause Depends Is Not Only Substantial and Needs Full Argument, But Has Not Been Passed Upon By This Court.

Under Paragraph 4 of Rule 7 of the revised rules of this court, this court will receive a motion to affirm on the ground that it is *manifest* that the appeal was taken for delay only or that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

Appellees' only claim is that the questions involved are not substantial.

Appellees, of course, have the burden of making it manifest to the Court that the question here involved is so unsubstantial as not to need further argument.

In an effort to sustain this burden, appellees devote eight type-written pages to an effort to elucidate, without reference to the admitted facts of this particular case, their theory of the import of the Communications Act.

All the matter contained in the motion has been discussed under Point 1 of this brief and need not be repeated here.

It is enough to say in this connection that appellees have cited no cases other than *National Bradcasting Company* v. *United States* and *Churchill Tabernacle* v. *Federal Communications Commission* above analyzed to sustain their claim of power in the Commission to promulgate general rules applicable in any and all cases. It already has been shown that neither case supports this claim but, on the contrary, creates a clear implication in favor of appellant's contention.

This Court has not passed upon the question presented by this appeal. Rule 3.109 affects not only appellant but also all other owners of reserved time contracts. If Rule 3.109 is upheld as generally applicable to all cases, appellant and all other holders of reserved time contracts will suffer irreparable harm.

Appellant cannot realize the full consideration he was to receive upon his sale of the station except by the use of the reserved time. The business of The Boston Store requires radio advertising. Joliet, Illinois, is a small city located about fifty miles from Chicago. When its radio listeners wish to hear nationally important programs, they will tune in a Chicago station; when, however, they wish local news, they will tune in station WJOL. If The Boston Store has no program on WJOL it cannot advertise over the radio at all.

Chief Justice Groner, in the *Churchill Tabernacle* case, recognized that the important thing to the Church was its

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reserved time in which it wished to propagate its religious doctrines. He said, at page 247:

> "Its objective was and is the reasonable use of the facilities of its formerly owned radio station in the propagation of its religious doctrines. To deprive it of this is to destroy the bone and marrow of its being. Until now that right, confirmed by the Commission's approval, was secured by its contract. Now, it is lost in its entirety."

This applies equally to appellant and his right to advertise The Boston Store over station WJOL.

It therefore is submitted that the question presented by this appeal is a substantial question and should not be decided by this Court without the benefit of full and complete briefs and oral arguments.

Conclusion.

In conclusion appellant respectfully submits that the motion of appellees to affirm the judgment of the trial court should be denied.

Respectfully submitted,

SAMUEL E. HIRSCH,
Attorney for Appellant.

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APPENDIX.

IN THE DISTRICT COURT OF THE UNITED STATES,
For the Northern District of Illinois,
Eastern Division.

A. J. Felman *vs.* United States of America.	Civil Action No. 49-C-227 In Chancery

COMPLAINT FOR INJUNCTION.

Now comes the Plaintiff, A. J. Felman, by his attorneys, Samuel E. Hirsch and Wilhartz & Hirsch, and for his cause of action alleges as follows:

1. Plaintiff, A. J. Felman, is a resident of Joliet, Illinois, and is President of, and a substantial stockholder in, the M. A. Felman Company, an Illinois corporation, which operates a department store in Joliet, Illinois, under the trade name of Boston Store. All of the capital stock of the M. A. Felman Company is owned by A. J. Felman, his mother, Bertha Felman, and his sister, Hazel Felman Buchbinder.

2. This action is brought pursuant to the provisions of Section 402(a) of the Communications Act of 1934, as amended (June 7, 1934, C. 426, 48 Stat. 926; June 19, 1934, C. 652, Sec. 402, 48 Stat. 1093; May 20, 1937, C. 229, Secs. 11-13, 50 Stat. 197). Jurisdiction of this cause is conferred upon this court by Judicial Code and Judiciary, Title 28, U. S. C., Sec. 1336. The Defendant, United States of

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America, is made a party to this proceeding pursuant to the provisions of Judicial Code and Judiciary, Title 28, U. S. C., Sec. 2322.

3. On and prior to June 21, 1932, Plaintiff, A. J. Felman, was the owner of all the issued and outstanding stock of W. C. L. S., Inc., an Illinois corporation, which corporation owned and operated radio station W.C.L.S., located in Joliet, Illinois.

4. On the aforesaid date, namely, June 21, 1932, said A. J. Felman entered into a contract with one R. W. Hoffman, of Cicero, Illinois, to sell and transfer to R. W. Hoffman all of the issued and outstanding stock of W. C. L. S., Inc., pursuant to the terms and conditions contained in said contract. Included in said contract were certain provisions for the use by A. J. Felman of the radio broadcasting time specified therein on radio station W. C. L. S. or radio station W. K. B. B., without cost.

5. On August 9, 1937, the aforesaid contract dated June 21, 1932, was cancelled by mutual agreement of the parties, and a new contract was entered into on said date between said parties as follows:

"My dear Mr. Felman:

On June 21, 1932, we entered into a contract with you in which WCLS, Inc. agreed to make available to you certain period of broadcasting time on its station WCLS, at Joliet, Illinois. We understand that you are agreeable to the cancellation of said contract upon the following terms and conditions:

1. WCLS, Inc. will, so long as Station WCLS is operated, make available to you, for the purpose of advertising the business of yourself, the Boston Store, the M. A. Felman Company or any other firm with which you do any business, three-quarters (¾) hour per day of broadcasting time on WCLS, one quarter (¼) hour between 11:45 A.M. and 12:00 noon, and one-half hour (½) between the hours of 6:00 and 8:30 P.M. without charge to you or to the firms advertised,

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WCLS, Inc. or any future owner to furnish the programs broadcast, which during your said daily periods will be subjected to the rules and regulations of Station WCLS and of the Federal Communications Commission.

2. R. W. Hoffman will pay you the sum of Five Thousand Dollars ($5000.00), payable as follows: Five Hundred Dollars ($500.00) on your acceptance of this letter, and Five Hundred Dollars ($500.00) on the first of each and every month thereafter until said $5,000.00 is paid."

6. The aforesaid broadcasting time made available to A. J. Felman and the $5,000 payable in ten (10) consecutive monthly installments was and is part of the consideration between the parties for the sale and transfer of the aforesaid stock of W. C. L. S., Inc. to R. W. Hoffman.

7. All programs, announcements and advertisements used by Plaintiff, A. J. Felman, during the time made available to him on radio station W. C. L. S. have, pursuant to the rules and regulations of the Federal Communications Commission and the rules and regulations of radio station W.C.L.S., been submitted to the management of said station for approval prior to the broadcast thereof. Said radio station has, at all times during the term of said contract, reserved and maintained the right to change, modify, object to and reject any material submitted by Plaintiff for broadcasting purposes. The program scripts are written by the advertising manager of the Boston Store and are sent to the radio station for approval at least 24 hours in advance, and generally a week in advance. Each script must be and is approved by the station's program director, who may edit and revise the material submitted. In all respects the material submitted by Felman is accorded the same treatment as that submitted by all other advertisers. In addition, radio station W. C. L. S. has, at all times during the term of the above

contract, reserved the right to substitute programs during the times reserved for A. J. Felman, when, in the opinion of the station management, such substitution of programs was deemed to be in the public interest. When time is so used in the public interest, other available time is given to Felman.

8. The station has never found the material submitted by Felman objectionable in nature, nor has it ever had any other cause to refuse or reject, nor has it ever refused or rejected, said material. Each script is examined on the basis of whether it is in good taste.

9. Pursuant to the terms of the aforesaid contract dated August 9, 1937, Plaintiff, A. J. Felman, received, without charge, the following time to use for broadcasting purposes: 11:45 A. M. to noon, and 7:30 P. M. to 8:00 P. M., daily. This arrangement was subsequently changed so that Plaintiff now receives, without charge, for broadcasting purposes: 11:45 A. M. to noon, and 7:45 P. M. to 8:00 P. M., and fifteen minutes in a later period, daily.

10. Of the total time allowed to Plaintiff under the above contract, a portion is used to advertise the merchandise sold by the Boston Store. The remainder of the time is sold by Felman to various sponsors. Felman receives payment for this time at a rate less than that charged by radio station W. C. L. S. All of the sponsors to whom Felman sells time do business with the Boston Store in Joliet, Illinois. Said sponsors are personally known to the management of radio station W. C. L. S. who know the main place of business, the reputation and the products sold by each of said sponsors, and who know, from investigations carried on by the station, that they are reputable firms.

11. The types of programs broadcast by these various sponsors consist of the following:

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(a) Five-minute transcriptions called:
Love-Notes
Hollywood News
Anne of the Air Lanes.
said transcriptions are purchased from outside sources and are sold to and used by between 100 to 200 radio stations throughout the country.
(b) Transcribed light concert music taken from the radio station's World Library.
(c) Spot announcements advertising merchandise on sale at the Boston Store.

12. On January 6, 1949, the Federal Communications Commission issued and promulgated a Report and Order "In the Matter of Promulgation of Section 3.109, 3.241 and 3.641, containing Special Rules Relating to Contracts Providing for Reservation of Time upon Sale of a Station," which Report and Order provided for the issuance of certain special rules and regulations with reference to the reservation of time upon sale of a station. Said Report and Order, and the rules and regulations therein referred to and attached thereto as an appendix, are attached hereto as "Exhibit 1" and made a part hereof as though fully set forth in *haec verba*.

13. On February 3, 1949, the Federal Communications Commission issued its "Revised Proposed Decision" as follows:

> "1. The Commission has before it the record in the proceeding involving the above-entitled application, its Proposed Decision adopted July 13, 1946, and the Hearing Examiner's Recommended Decision, dated June 2, 1948, relating to the further hearing held in this proceeding. The Commission is in agreement with the findings and conclusions contained in the Examiner's Recommended Decision dated June 2, 1948, and hereby adopts these findings and conclusions as its Proposed Decision relating to the issues in the further hearing. The Examiner's Recommended Decision is attached hereto.

"2. On January 6, 1949, the Commission adopted rules relating to contracts providing for the reservation of time upon the sale of a station. These rules, effective February 15, 1949, are Sections 3.109, 3.241 and 3.641. Section 3.109 relates to standard broadcast stations. These rules were prepared and adopted in accordance with the principles enunciated in *Churchill Tabernacle* v. *Federal Communications Commission*, 81 App. D. C. 411, 106 F. 2d 244 (U. S. App. D. C. 1947). In view of the provisions of the contract between the above-entitled licensee and Mr. A. J. Felman and the provisions of Section 3.109 of our Rules, we believe that the licensee should be required to comply with the provisions of this rule prior to a final determination in this proceeding.

"3. Accordingly, we propose to grant the above-entitled application conditionally. The condition is that within six months from February 15, 1949, the applicant shall comply with the provisions of Section 3.109 of the Commission's Rules. No final grant of renewal of license will be made until the applicant complies with the foregoing condition."

The aforesaid rules and regulations of the Federal Communications Commission will therefore be given full force and effect by the Federal Communications Commission on and after February 15, 1949, unless enjoined and restrained by this Court.

14. Said rules and regulations of the Federal Communications Commission, as they apply to Plaintiff herein and to the contract dated August 9, 1937, deprive Plaintiff of his property without due process of law, contrary to the provisions of the Fifth Amendment to the Constitution of the United States, for in that:

(a) The provisions of Rules 3.109, 3.241 and 3.641, limiting the duration of contracts reserving radio broadcasting time to the seller to February 15, 1964, deprives plaintiff herein of a substantial part of the consideration to be received by him from the purchaser of the capital stock of W.C.L.S., Inc.

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(b) The provisions of Rules 3.109, 3.241 and 3.641, requiring that the contract heretofore entered into between Plaintiff and R. W. Hoffman, be modified so as to permit the termination thereof by licensee upon the payment of a lump sum or periodic payments, the amount of which is subject to the approval of the Commission and must not in any event be so large as to constitute in practice an effective deterrent to the licensee exercising the right, deprives plaintiff of his property without due process of law.

(c) The provisions of Rules 3.109, 3.241 and 3.641 requiring the modification of plaintiff's contract so as to prohibit the resale or reassignment of any of the broadcast time reserved in and by said contract, unreasonably and arbitrarily deprives plaintiff of his right to sell, transfer or alienate his property.

(d) The provisions of Rules 3.109, 3.241 and 3.641 providing for the modification of plaintiff's contract so as to limit the time reserved in and by said contract to not more than 12 hours per week and 4 hours on any given day, constitute an arbitrary and unreasonable confiscation of plaintiff's property without due process of law.

15. Said rules and regulations of the Federal Communications Commission, which become effective on February 15, 1949, do not in any way promote or tend to promote the public interest or welfare. The rules and regulations of the Federal Communications Commission in effect prior to February 15, 1949, and in particular, those pertaining to the retention of control by the licensee of the programs broadcast by the radio station and the substitution of programs regularly broadcast for those deemed in the public interest provide adequate protection of the public interest and welfare.

16. The contract of August 9, 1937, and the terms and conditions contained therein do not impair the financial condition or position of radio broadcasting station W. C. L. S.; nor does it deprive the management of said station

of any of the duties or responsibilities imposed upon it under its license to transmit radio broadcasts; nor does it infringe upon, restrict or limit said licensee's power and authority to broadcast programs designed to stimulate and promote the public interest and welfare; nor does said contract constitute, in fact, a delegation, in whole or in part, of licensee's rights, privileges, duties and responsibilities to the plaintiff herein; nor does said contract constitute a delegation, in whole or in part, of the control by licensee of the programs and materials transmitted from station W.C.L.S. for broadcasting purposes; nor does said contract constitute an assignment, in whole or in part, of said license. Said rules and regulations were promulgated by the Federal Communications Commission without lawful authority and do not, in any way, promote or tend to promote the objects of the Communications Act of 1934, as amended.

17. The rule-making power of the Federal Communications Commission granted in Section 303(r) of the Communications Act of 1934, as amended, which provides that the Commission shall, from time to time, as public convenience, interest or necessity requires, "make such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this Act, or any international radio or wire communications treaty or convention, or regulations annexed thereto, including any treaty or convention insofar as it relates to the use of radio, to which the United States is or may hereafter become a party." Said Rules 3.109, 3.241 and 3.641 do not in any way promote the public convenience, interest or necessity, are inconsistent with the laws of the United States, and are beyond the rule-making power of the Federal Communications Commission as established in and by the Communications Act of 1934, as amended.

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18. The promulgation of said rules 3.109, 3.241 and 3.641 by the Federal Communications Commission constitutes an arbitrary and unreasonable usurpation of powers not delegated to it by the Communications Act of 1934, as amended, or any other law of the United States.

19. Plaintiff has not adequate remedy at law to enforce the obligations under his contract of August 9, 1937, or to prevent the Federal Communications Commission from ordering the modification of said contract pursuant to Rules 3.109, 3.241 and 3.641 which become effective on February 15, 1949.

WHEREFORE Plaintiff prays that:

(a) This Court find that said Rules 3.109, 3.241 and 3.641, as they apply to plaintiff, are unconstitutional and of no force and effect.

(b) This Court find that said rules were promulgated and issued by the Federal Communications Commission without lawful authority.

(c) This Court find that the contract dated August 9, 1937, between plaintiff and R. W. Hoffman is a good, valid and subsisting contract, enforceable in the courts of law.

(d) This Court find that any order issued by the Federal Communications Commission, requiring the amendment or modification of said contract so as to make it conform with the provisions of Rules 3.109, 3,241 and 3.641, is outside the constitutional and statutory powers of the Commission.

(e) This Court enter a temporary restraining order enjoining the Federal Communications Commission, its members, officers, agents, attorneys, servants and employees, from enforcing the operation of Rules 3.109, 3.241 and 3.641, pending the final hearing and determination of this action.

(f) This Court, after a final hearing and determination of this action, issue a permanent restraining order enjoining the Federal Communications Commission, its members, officers, agents, attorneys, serv-

ants and employees, from enforcing the operation of Rules 3.109, 3.241 and 3.641.

(g) This Court enter such other and further orders as shall do justice and equity between the parties.

A. J. FELMAN,
Plaintiff,

By SAMUEL E. HIRSCH,
WILHARTZ & HIRSCH,
His Attorneys.

SAMUEL E. HIRSCH,
WILHARTZ & HIRSCH,
Attorneys for Plaintiff,
38 South Dearborn Street,
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FEDERAL COMMUNICATIONS COMMISSION

Washington 25, D. C.

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In the Matter of
Promulgation of Section 3.109, 3.241 and 3.641 containing special rules relating to contracts providing for reservation of time upon sale of a station.

Docket No. 8774.

REPORT AND ORDER.

By the Commission: (Commissioners Coy, Chairman and Sterling not participating.)

On February 6, 1948, the Commission issued a Notice of Proposed Rule Making looking towards the adoption of special rules relating to contracts providing for reservation of radio time upon the sale of the station. On April 14 1948 a Supplemental Notice of Proposed Rule Making was issued in connection with the same matter. Comments of interested parties with respect to both the original notice and the supplemental notice of proposed rule making were received by the Commission and oral argument took place on June 28, 1948. The following parties participated in this argument: Berachah Church, Inc., Albert J. Felman, J. Frank Norris, William Penn Broadcasting Company and Tarrant Broadcasting Company. William Penn Broadcasting Company and Tarrant Broadcasting Company, in general, supported the rules as proposed by the Commission in its Notices of February 6 and April 14, 1948. Only one of the Parties, Albert J. Felman, has offered general objection to the adoption of rules such

as were proposed in these Notices. Mr. Felman contends that the Commission is without authority under the Communications Act of 1934 to adopt such rules and alleges that adoption of such rules would constitute a violation of the Fifth Amendment insofar as they may be applicable to a contract between Mr. Felman and Station WJOL which provides for the reservation of time and other rights to Mr. Felman. It is believed that these objections are without merit.

It is no longer open to question that under the Communications Act a station licensee is fully responsible for the operation and the control of his broadcast station and that he cannot properly divest himself by contract or otherwise of such responsibility. The Act imposes upon the licensee the obligation to operate in the public interest and that responsibility is his alone. It is the licensee who must determine the selection and choice of programs and it is he who must determine the specific nature of the program structure which in the light of the specific circumstances and needs of the area which he serves will constitute a well rounded program service, consonant with his obligation to operate in the public interest. While the Commission does review the overall operation of stations to determine whether the licensee has in fact presented a well rounded program service, in day to day operations the licensee must exercise his own independent judgment and the types of decisions which the licensee is called upon to make in the day to day operation of the station cover the widest variety of subjects and interests. In passing upon the individual cases which have come before it the Commission has repeatedly emphasized that it is the station licensee who is responsible for the conduct of the station and for the operation in the public interest and the Commission has required that this responsibility be not delegated whether by contract or otherwise to another. This principle of licensee responsibility, which the Commission has con-

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sistently applied, was expressly recognized and approved by the Supreme Court in the case of *National Broadcasting Company* v. *United States*, 319 U. S. 190 (1943).

In accordance with the principle of licensee responsibility, the Commission has heretofore determined that it is not in the public interest and inconsistent with the nature of the rights conferred by a license under the Communications Act and duties for owners of radio stations as part of the consideration for the transfer of such stations, to reserve the right to the use of radio time on the station being sold, to attempt to obtain a right of reverter of license, or to obtain other rights which under the Communications Act can be exercised only by licensees. *Churchill Tabernacle* v. *Federal Communications Commission*, 81 App. D. C. 411, 160 F. 2d 244 (U. S. App. D. C. 1947). Subsection (a) of each of the attached rules embodies in the form of a regulation the Commission's consistent interpretation of the provisions and requirements of the Communications Act in licensing and other proceedings. Nor would it appear that such requirements, so long as they are properly within the scope of the Commission's authority, are improper merely because they apply to existing arrangements. *National Broadcasting Company* v. *United States*, 319 U. S. 190 (1943); *Churchill Tabernacle* v. *Federal Communications Commission, supra.*

In order to avoid undue hardship to licensees who entered into such contracts in good faith at a time when Commission policy with respect to such matters was not clear, and who fully disclosed such contracts to the Commission, the Commission has in the past permitted such licensees to secure renewal of licenses upon entering into appropriate modifications of such contracts. The Commission, however, recognizes that the parties in many instances are not in a position to take advantage of this procedure since they do not know what standards they

must conform to in modifying their contracts. Accordingly, subsection (b) of each of the attached rules set forth the minimum conditions which must be complied with before such modification of contracts will be approved by the Commission.

In arriving at these determinations, the Commission recognizes that persons who have made contracts with respect to the reservation of radio time in connection with the sale of a radio station have equities in these contracts which the Commission can appropriately recognize to the extent that it is able to do so consistent with the requirement of the Communications Act, and the proper discharge of the Commission's responsibilities under it. In promulgating the rules set out below the Commission feels that it has given recognition to these equities in accordance with the principles enunciated in *Churchill Tabernacle* v. *Federal Communications Commission* 81 App. D. C. 411, 160 F. 2d 244 (U. S. App. D. C. 1947). Subsections (b) (1) (2) (3) of each of the attached rules are all based upon the Commission's determination that under the Communications Act of 1934, the determination of radio program material is the responsibility of the individual station licensee and that this responsibility cannot be fettered in such a way as to make the exercise of that responsibility at anytime impossible. Subsections (b) (4) and (5) of each of the attached rules are based upon Sections 301 and 309(b) of the Communications Act which make clear that licensees do not possess any property rights in license. It therefore appears to be clearly contrary to the public interest to permit the rights granted by licensees to be the subject of encumbrance by creation of interests enduring in perpetuity or for unreasonably long periods of time. In providing that agreements of the type under consideration shall contain a certain expiration date which shall not extend beyond February 15, 1964 the Commission has taken into consideration that in an industry as dynamic as radio,

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which is not yet even 30 years old, a contract of this nature which would still have 15 years before its termination is a contract of very long duration. It is to be noted that in an agreement entered into by J. Frank Norris, one of the parties appearing in this matter, and the Tarrant Broadcasting Company, licensee of Station KFJZ, the parties have themselves provided that the agreement shall not extend beyond 15 years. Under those circumstances, it appears that subsection (b) (4) and (5) of the rules adequately preserve the interests of those parties who have contracts with licensees with respect to the reservation of time.

Several parties have objected to the Commission's original proposal to provide that all such agreements contain an express provision giving the licensee the right at any time to terminate the contract at his own discretion upon the payment of a lump sum or periodic payments. It was contended that giving a licensee such unlimited power to terminate such a contract was unreasonable in view of the unfavorable situation in which it placed the other parties to such contracts who had bargained for radio time and not a lump sum or periodic cash payments. In order to protect the equities of such persons subsection (b) (6) of each of the attached rules as adopted hereinunder provides that the exercise of a right of termination shall be based on substantial cause as in circumstances under which the licensee proposes to assign the license or to transfer control of a corporate licensee and the contract providing for the reservation of time constitutes a hindrance to such assignment or transfer. It is believed that such a right of termination is necessary in order that the opportunity of licensees to make provisions under Section 310(b) of the Communications Act should not be hampered, and third parties who may assume the duties of a licensee, with the Commission's consent, should not be required

to abide by such conditions as are set out in those contracts if in their judgment they desire to make other program plans in fulfilling their responsibilities as a licensee. Further examples of when the licensee would be permitted to exercise his right of termination is when the licensee acquires a network affiliation or there is consistent disagreement as to programs between the parties. It is felt, however, that the provision that the amount initially fixed shall thereafter decrease as the amount of time reserved is decreased by the performance of the contract is both fair and necessary. The equities of persons who have contracted with licensees for reservation of time are not prejudiced since the equities of such persons are of necessity diminished as they receive the radio time for which they bargained. The attached rules provide that in connection with consideration of proposed amounts to be paid upon the exercise of termination, the Commission will consider the amount by which consideration in return for the transfer of the station was decreased by reason of the reservation of time or the present value of the radio time still reserved and unused as of the date of the exercise of the right of termination. It is felt that these provisions adequately take into consideration the equities of all persons.

Accordingly, in accordance with the Authority of Sections 301, 303(4), 307, 308(b), 309 and 319 of the Communications Act of 1934, as amended, Sections 3.109, 3.241 and 3.641 are adopted effective February 15, 1949, as set forth, in the attached Appendix.

FEDERAL COMMUNICATIONS COMMISSION,
T. J. SLOWIE,
Secretary.

Adopted: January 6, 1949
Released: January 7, 1949

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Rule 3.109 of the Federal Communications Commission Applying to Standard Broadcast Stations.

§ 3.109. *Special rules relating to contracts providing for reservation of time upon sale of a station.* (a) No license, renewal of license, assignment of license, or transfer of control of a corporate licensee shall be granted or authorized to a standard broadcast station which has a contract, arrangement or understanding, express or implied, pursuant to which, as consideration or partial consideration for the assignment of license or transfer of control, the assignor of a station license or the transferor of stock, where transfer of a corporate licensee is involved, or the nominee of such assignor or transferor retains any right of reversion of the license or any right to the reassignment of the license in the future, or reserves the right to use the facilities of the station for any period whatsoever.

(b) In the case of assignment of license or transfer of control of a corporate licensee approved by the Commission before the effective date of this rule February 15, 1949 involving a contract, arrangement or understanding of the type covered by subsection (a) hereof and the existence and terms of which were fully disclosed to the Commission at the time of execution, the Commission will give consideration to the issuance of a license despite the existence of such contract, arrangement or understanding, if the parties thereto modify such contract within 6 months from the effective date of this rule. Such modifications will be considered on the facts of each case but no such modification will be approved unless the modified contract contain at least the following provisions:

1. A maximum limitation of the time subject to reservation so that no more than 12 hours per week shall be

subject to reservation, of which no more than 4 hours shall be on any given day.

2. A clause providing that the licensee reserves the right to reject or refuse programs which he reasonably believes to be unsatisfactory or unsuitable or for which, in his opinion, a program of outstanding local or national importance should be substituted, but provision may be made for the substitution of other radio time for program so rejected or for the payment at the station card rate for the time made available.

3. A prohibition against the resale or reassignment of any of the broadcast time reserved by such modified contract.

4. An express negation of any right with respect to reversion or reassignment of license.

5. An express provision setting forth a definite expiration date of the contract, arrangement or understanding. Such expiration date shall not extend beyond February 15, 1964 and shall in no event extend beyond the expiration date originally provided for in any such contract, agreement or understanding, in the event that such expiration date is a date prior to February 15, 1964.

6. An express provision giving to the licensee the right to terminate the contract, arrangement or understanding for substantial cause, including, but not limited to, the assignment of license or the transfer of control of a corporate licensee, consistent disagreement over programs between the parties, or the acquisition of a network affiliation by the licensee, upon the payment of a lump sum or periodic payments, and providing that the amount initially fixed shall thereafter decrease as the amount of time reserved is decreased by performance of the contract. Any such payment should not be so unduly large as to constitute in practice an effective deterrent to the licensee exer-

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cising the right of termination. In determining whether the amount is unduly large, the Commission will consider the amount by which consideration in return for the transfer of the station was decreased by reason of the reservation of time or the present time value of the radio time still reserved and unused as of the date of the exercise of the right of termination.

Note. Rules 3.241 and 3.641 are omitted as they apply to F. M. and Television stations respectively. However the text is identical in all three rules.

In the United States District Court for the Northern District of Illinois, Eastern Division

CIVIL ACTION No. 49 C 227

A. J. FELMAN, PLAINTIFF

v.

UNITED STATES OF AMERICA AND FEDERAL COMMUNICATIONS COMMISSION

MOTION TO AFFIRM

Pursuant to Paragraph 3 of Rule 12 of the Revised Rules of the Supreme Court of the United States, appellees United States of America and Federal Communications Commission move that the judgment of the district court from which the appeal has been taken be affirmed.

This is an appeal from the final judgment entered on March 13, 1950, by a three-judge district court constituted pursuant to the provisions of Section 402 (a) of the Communications Act of 1934, as amended, 47 U. S. C. 402 (a), granting appellees' motion for summary judgment in an action brought by appellant to enjoin the enforcement of Section 3.109 of the Rules and Regulations of the Federal Communications Commission

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(14 F. R. 179). The appeal was taken pursuant to Section 1253 of Title 28, United States Code.

Appellant is the former owner of the standard broadcast radio station WCLS (now WJOL). In 1932 he sold all the stock of the corporate licensee of the station to one R. W. Hoffman.[1] As part of the consideration for sale of the station, appellant retained the right to free use of certain broadcast time. On August 9, 1937, the parties replaced this contract by a new contract, which is presently in force. It provides that the station, as long as it is operated, will furnish appellant, without cost, ¾ of an hour per day of broadcast time for the purpose of advertising his own business or any other firm with which he does business. An application for a renewal of station WJOL's license is presently pending. The station has been granted successive extensions of time, largely because of pendency of proceedings relating to the contract granting reserved time to appellant, and the station is currently operating under a temporary license expiring June 1, 1950.

Section 3.109 of the Rules and Regulations of the Federal Communications Commission, which appellant is attacking in this action, was promulgated by the Commission's Report and Order of

[1] The call letters of the station were subsequently changed to WJOL and it will hereafter be referred to as WJOL. In 1932 the corporate licensee was WCLS, Inc., which later changed its name to Joliet Broadcasting Company.

January 7, 1949, effective February 15, 1949. The Order issued following a Notice of Proposed Rule Making on February 5, 1948, and a Supplemental Notice on April 14, 1948. The notices gave interested parties opportunity to submit comments on the proposed rules and to present oral argument before the Commission. Appellant and other interested parties did submit comments and present oral argument to the Commission.[2]

Section 3.109, which is set forth in Appendix A hereto, concerns contracts made by vendors of radio stations reserving broadcast time, station control, or a reversionary interest therein. Subsection (a) sets forth the general rule that no licenses shall be issued to stations which, as consideration for their transfer or assignment, enter into contracts reserving in the transferor a right of reversion or reassignment of the license, or reserving a right to use the facilities of the station for any period.

Subsection (b) is a proviso applicable to appellant, and covers the situation where such a contract was in existence at the time the regulation issued, and had been disclosed to and approved by the Commission in passing on the transfer of the license. In such cases, the Com-

[2] After the present action was instituted, the Commission issued on August 10, 1949, a memorandum opinion and order denying petitions for rehearing filed by two parties who had participated in the rule-making proceeding. 1 Pike & Fischer R. R. 91 : 124.

mission will consider issuance of a license if the contract is modified. It is provided that such modifications "will be considered on the facts of each case but no such modification will be approved unless the modified contract contains at least" the provisions set forth in six subsections. The three which appellant attacks in this suit provide, in substance, as follows:

3 8. A ~~provision giving the licensee the~~ prohibition against resale or re- assignment of any of the reserve broadcast time.

5. An express expiration date for the contract, which date shall not extend beyond February 15, 1964, or the expiration date provided by the contract, whichever is earlier.

6. A provision giving the licensee the right to terminate the contract for substantial cause, including transfer of control of the license, consistent disagreement on programs, or the acquisition of a network affiliation, upon payment by the licensee of an amount to be agreed upon, but which should not be so unduly large as to constitute an effective deterrent to the licensee exercising the right of termination, and which amount would be decreased as the time reserved by the contract decreases as a result of performance.

Appellant attacks these regulations upon the ground that they exceed the rule-making power of the Commission and constitute a deprivation of property contrary to the Fifth Amendment.

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The district court, in granting summary judgment for appellees, filed findings of fact and conclusions of law, but did not render an opinion. The court's conclusions state that the regulations which are in issue on this appeal are within the rule-making authority of the Commission under the Federal Communications Act, are a reasonable exercise of that authority, and do not deprive appellant of property without due process of law.

We submit that the district court's decision clearly is correct. It is settled that the statute authorizes the Commission to make rules and regulations directed against restraints imposed by third persons upon a licensee's operation of a broadcasting station, when such restraints may interfere with the licensee's ability to render the best practicable service to his listening public. *National Broadcasting Company* v. *United States,* 319 U. S. 190. Section 4 (i) of the Act, 47 U. S. C. 154 (i), provides that "the Commission may make such rules and regulations, not inconsistent with this Act, "as may be necessary in the execution of its functions," and Section 303 (r), 47 U. S. C. 303 (r), authorizes the Commission to make such rules and regulations, not inconsistent with law, "as may be necesary to carry out the provisions of this Act."

The import of the Federal Communications Act is that the licensee of a radio station shall be fully amenable to public regulation of his station for the purpose of assuring operation of

the station in the public interest. The Commission may therefore adopt regulations against grant or renewal of a broadcasting license if the licensee has assumed an obligation to a third person encroaching upon his ability best to serve those whom his broadcasts reach.

The regulations involved here are of the same general kind and purpose as those upheld in *National Broadcasting Company* v. *United States, supra.* In both cases the regulations set forth in general terms the policy of the Commission in considering applications for licenses, and they proscribe contractual arrangements imposing an unreasonable limitation upon the freedom of the licensee to utilize broadcast time, and to be responsible for such utilization, in the public interest. The regulations "represent a particularization of the Commission's conception of the 'public interest' sought to be safeguarded by Congress in enacting the Communications Act of 1934." 319 U. S. 190, at p. 218.

Section 3.109 (b) represents the Commission's considered determination of how best to accommodate the "public interest" standard which it is under mandate to enforce, with conflicting outstanding private contractual interests. The regulation states minimum requirements to be required of all licensees. The reasons and bases for the three subsections which appellant questions may be summarized as follows:

Subsection (3) of Section 3.109 (b) prohibits the resale or reassignment to third parties of time reserved for his own use by the transferor or assignor of a station license. This prohibition insures that a licensee will continue to perform the elementary function of making the initial determination as to who shall broadcast over his station. The provisions of the Communications Act concerning determination by the Commission of the qualifications of licensees would be largely nullified if a licensee can, by contract, delegate to others the basic function of deciding to whom broadcast time is to be made available and for what purposes. Such a transfer of a licensee's prerogative is inconsistent with Section 310 (b) of the Act, which prohibits not only the transfer of a license without the prior consent of the Commission but the transfer of the "rights therein granted" unless the Commission first finds that such a transfer or disposal of rights is in the public interest.

Subsection (5) limits reservations of broadcast time to a maximum of fifteen years after the effective date of the rule. It thereby prevents licensees from disregarding their obligation periodically to review and reevaluate their program structure and to make such changes as will serve the public interest. If a station has by contract committed itself to broadcast the programs of any particular person or organization during cer-

tain hours of the day and week and over a large number of years, or indefinitely as in the instant case, it will have given up a large measure of its control over its facilities. It will be unable adequately to exercise its responsibility to watch over the station's program structure and to revise it from time to time. Since subsection (5) permits existing contracts to remain in effect for fifteen years subsequent to the adoption of the Rule, it cannot be said that the period of grace is unreasonably short or that there is an interference with existing equities.

Subsection (6) provides that the contract give the licensee a right of termination, for "substantial cause," upon the payment of a fair sum to be decided upon by the contracting parties. This requirement protects existing equities, but at the same time provides that the licensee shall have a power of contract termination requisite to performance of his duties as licensee. Consistent disagreement over programs, acquisition of a network affiliation by the licensee, assignment of a license, and transfer of control of a corporate licensee are given as illustrations of substantial cause for termination. Thus, a new transferee or assignee would be able to schedule the programs he believes desirable without being bound by the action of the former licensee. Similarly, acquisition of a network affiliation may open the door to programs of nationwide interest, which a right to reserved time might block. The rule

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leaves it to the parties to agree upon the sum to be paid by reason of termination for substantial cause, provided that the sum be not so large as effectively to prevent any termination.

Subsection (6) is thus a corollary to the provision in subsection (5) allowing properly modified contracts to continue in effect for fifteen years. It assures to licensees a necessary degree of flexibility during the contract period, in the event of a substantial change in circumstances. But the contract termination which is provided for may not be at the whim of the licensee, and the other contracting party is guaranteed reasonable compensation for the loss of its contract rights.

Section 3.109 is in full accord with the decision rendered in *Churchill Tabernacle* v. *Federal Communications Commission,* 160 F. 2d 244 (C. A. D. C.). In that case, which was decided prior to issuance of Section 3.109, the Commission denied an application for renewal of a station license unless the station would give no further effect to a contract which reserved to the transferor an exclusive use of broadcast time of 17½ hours per week for a period of nearly 100 years, and provided for a reversion of the license to the transferor if the contract provisions were not carried out. The court of appeals held that the Commission was authorized to find, as it did, that the contract provisions were contrary to the public interest. The court, however, pointed out

that the contract had been made in good faith, and held that the Commission had erred in requiring complete abrogation of the contract without considering the possibility of some other modification which would preserve so far as possible the equities of the transferor and yet be consistent with the public interest. The court remanded the case to the Commission to determine whether a modified contract, allowing a reservation of broadcast time for a period of reasonable duration, would be contrary to the public interest. The present regulations were promulgated in strict accordance with these principles.

Regents of the University System of Georgia v. *Carroll,* 338 U. S. 586, is not pertinent here. That case did not involve the power of the Commission to refuse to renew a license unless provisions of a contract made by the licensee, found to be inconsistent with proper performance of the licensee's duty to operate its station in the public interest, were abrogated or modified. The Court, in fact, assumed that the Commission was vested with such power (see pp. 595–596, 601). The case concerned solely the question, not presented here, of the effect of the Commission's rulings with respect to such a contract on the private rights of the parties in a proceeding thereunder in a state court following unilateral repudiation of the contract by the licensee.

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CONCLUSION

The appeal presents no substantial question. It is therefore respectfully submitted that the judgment of the district court should be affirmed.

PHILIP B. PERLMAN,
Solicitor General.

BENEDICT P. COTTONE,
General Counsel,
Federal Communications Commission.

APRIL 28, 1950.

APPENDIX

(14 F. R. 179)

§ 3.109 *Special rules relating to contracts providing for reservation of time upon sale of a station.* (a) No license, renewal of license, assignment of license, or transfer of control of a corporate licensee shall be granted or authorized to a standard broadcast station which has a contract, arrangement or understanding, express or implied, pursuant to which, as consideration or partial consideration for the assignment of license or transfer of control, the assignor of a station license of the transferor of stock, where transfer of a corporate licensee is involved, or the nominee of such assignor or transferor retains any right of reversion of the license or any right to the reassignment of the license in the future, or reserves the right to use the facilities of the station for any period whatsoever.

(b) In the case of assignment of license or transfer of control of a corporate licensee approved by the Commission before the effective date of this section, February 15, 1949, involving a contract, arrangement or understanding of the type covered by paragraph (a) of this section and the existence and terms of which were fully disclosed to the Commission at the time of execution, the Commission will give consideration to the issuance of a license despite the existence of such contract, arrangement or understanding, if the parties thereto modify such contract within

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6 months from the effective date of this section. Such modifications will be considered on the facts of each case but no such modification will be approved unless the modified contract contains at least the following provisions:

(1) A maximum limitation of the time subject to reservation so that no more than 12 hours per week shall be subject to reservation, of which no more than 4 hours shall be on any given day.

(2) A clause providing that the licensee reserves the right to reject or refuse programs which he reasonably believes to be unsatisfactory or unsuitable or for which, in his opinion, a program of outstanding local or national importance should be substituted, but provision may be made for the substitution of other radio time for programs so rejected or for the payment at the station card rate for the time made unavailable.

(3) A prohibition against the resale or reassignment of any of the broadcast time reserved by such modified contract.

(4) An express negation of any right with respect to reversion or reassignment of license.

(5) An express provision setting forth a definite expiration date of the contract, arrangement or understanding. Such expiration date shall not extend beyond February 15, 1964, and shall in no event extend beyond the expiration date originally provided for in any such contract, agreement or understanding, in the event that such expiration date is a date prior to February 15, 1964.

(6) An express provision giving to the licensee the right to terminate the contract arrangement or understanding for substantial cause, including,

but not limited to, the assignment of license or the transfer of control of a corporate licensee, consistent disagreement over programs between the parties, or the acquisition of a network affiliation by the licensee, upon the payment of a lump sum or periodic payments, and providing that the amount initially fixed shall thereafter decrease as the amount of time reserved is decreased by performance of the contract. Any such payment should not be so unduly large as to constitute in practice an effective deterrent to the licensee exercising the right of termination. In determining whether the amount is unduly large, the Commission will consider the amount by which consideration in return for the transfer of the station was decreased by reason of the reservation of time or the present value of the radio time still reserved and unused as of the date of the exercise of the right of termination.

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JUNE 5, 1950.

Per Curiam Decisions.

No. 814. FELMAN *v.* UNITED STATES ET AL. Appeal from the United States District Court for the Northern District of Illinois. *Per Curiam:* The motion to affirm is granted and the judgment is affirmed. *Samuel E. Hirsch* for appellant. *Solicitor General Perlman* and *Benedict P. Cottone* for appellees.